

(4)

Supreme Court, U.S.

FILED

JUL 3 1997

No. 96-1133

DEPT. OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD G. SCHEFFER

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

JOINT APPENDIX

ORMOND R. FODREA

*Major, United States Air Force
Appellate Defense Division
Bolling Air Force Base
Washington, D.C. 20332-8000
(202) 767-1562*

*Counsel of Record
for Respondent*

WALTER DELLINGER

*Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217*

*Counsel of Record
for Petitioner*

PETITION FOR WRIT OF CERTIORARI FILED:

JANUARY 16, 1997

CERTIORARI GRANTED: MAY 19, 1997

76 p/2

TABLE OF CONTENTS

	Page
Accused's Motion Concerning Polygraph	
Evidence, including attachments	1
Government's Response to Accused's Motion	15
Military Judge's Ruling on Accused's Motion	
(ROT pp. 42-46)	23
Accused's Testimony (ROT pp. 288-291, 304-313) ...	30
Renewed Defense Motion (ROT p. 316)	48
Closing Arguments (ROT pp. 339 <i>et seq.</i>)	50

DEPARTMENT OF THE AIR FORCE
AIR FORCE LEGAL SERVICES AGENCY
USAF JUDICIARY WESTERN CIRCUIT
TRAVIS AIR FORCE BASE, CALIFORNIA 94535

UNITED STATES

v.

AMN EDWARD G. SCHEFFER
FR554-85-0300
22 Transportation Squadron
March AFB, California

**ACCUSED'S MOTION CONCERNING THE
ADMISSION OF POLYGRAPH RESULTS**

ISSUE

Whether the application of Military Rule of Evidence 707 to prohibit the accused from introducing in his defense the results of an exculpatory polygraph examination would render this court-martial fundamentally unfair and deprive him of due process of law?

FACTS

1. On 7 April 1992, Airman Scheffer provided a urine sample at the request of Special Agent Rob Shilaikis, of Detachment 1803, Air Force Office of Special Investigations, March AFB, California.

2. On 10 April 1992, Special Agent J. Black, a polygrapher trained and certified by the Department of Defense, who was assigned to AFOSI, District 18, Norton AFB, California, administered a polygraph examination to Amn Scheffer.

3. SA Black asked Amn Scheffer several "relevant" questions, among them: "Since you've been in the Air Force, have you used any illegal drugs?" Amn Scheffer responded that he had not.

4. SA Black, as well as other qualified and experienced polygraphers, determined that Amn Scheffer's responses "indicated no deception." This means, in lay terms, that he "passed" the test—he was telling the truth.

5. In May 1992, the Air Force Drug Testing Laboratory, located at Brooks AFB, Texas, reported that Amn Scheffer's urine sample tested positive for the presence of methamphetamine metabolites. The results of this urinalysis form the sole basis for Charge II and its specification.

LAW AND ARGUMENT

The Court of Military Appeals, in *U.S. v. Gipson*, 24 M.J. 246 (CMA 1987), recognizes the argument that an accused has a constitutional right to present exculpatory evidence which is relevant and helpful. "When evidence meets these criteria, [that is, relevance and helpfulness,] no additional justification for admissibility is necessary. Mil. R. Evid. 401 and 402." *Gipson*, supra, at 252. The Court ruled that the military judge's refusal to allow the defense to attempt to lay a foundation for the admissibility of the results of an exculpatory polygraph examination was reversible

error. The Court suggests that military judges should, for due process purposes, "bend even further than normal in the direction of giving the accused the benefit of the doubt," when evaluating the admissibility of polygraph evidence under MRE 401 through 403.

This liberal approach to the admissibility of defense evidence is founded upon an accused's constitutional right to a fair trial and to due process of law. As the Supreme Court states in *Chambers v. Mississippi*, 41 United States Law Week 4266, 4269 (1973), "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The right[] to . . . call witnesses in one's own behalf [has] long been recognized as essential to due process." The Court considers this right to call witnesses and present evidence—the accused's "right to his day in court"—to be one of "the most basic ingredients" and "fundamental element[s]" of due process. *Washington v. Texas*, 388 U.S. 14, 18 (1967).

Admittedly, the government has an interest in formulating procedural rules that assure, insofar as possible, that only reliable evidence is presented to the trier of fact. A problem of constitutional dimensions may arise, however, when the state enacts a per se rule prohibiting the admission at trial of certain types of evidence. These per se rules are often violative of due process. See *Rock v. Arkansas*, 55 United States Law Week 4925 (1987) (hypnotically-refreshed testimony), *Chambers*, supra (hearsay), and *Washington*, supra (testimony of principal in same crime).

In fact, when evidence bears persuasive assurances of trustworthiness, and is critical to the defense, the best rule is that the per se procedural rule should be critically evaluated. For instance, the Supreme Court in *Chambers* remarked, "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers*, supra, at 4271.

Military Rule of Evidence 707 would operate to prohibit Amn Scheffer from seeking to introduce the results of the exculpatory polygraph. The Discussion to this per se procedural rule indicates that in the opinion of the Drafters of the Manual for Courts-Martial and, hence, in the opinion of the Executive, there is an "aura of near infallibility" about a polygraph test which creates "a danger of confusion of the issues," "can result in a substantial waste of time," and "places a burden on the administration of justice that outweighs the probative value of the evidence." The Drafters also maintain that the reliability of the polygraph machine has not yet been determined.

The problem, of course, is that the Drafters and the Executive have not analyzed this *particular* polygraph test. Their Rule prohibits the admission of the results of this *particular* polygraph test when it may very well be perfectly reliable and probative and not misleading. In any event, it certainly constitutes evidence that is material and necessary to Amn Scheffer's defense.

CONCLUSION AND RELIEF REQUESTED

Military Rule of Evidence 707, a per se procedural rule enacted by executive fiat, violates Amn Scheffer's right to due process of law. You should declare it unconstitutional, and disregard it.

The defense should be allowed to lay a foundation for the admission of the polygraph test at issue. The military judge should evaluate the adequacy of the foundation from the standpoint of relevance and helpfulness and, "in these areas, judges should bend even further than normal in the direction of giving the accused the benefit of the doubt." *Gipson*, supra, at 252.

/s/ WILLIAM A. KURLANDER

WILLIAM A. KURLANDER, Capt, USAF
Detailed Defense Counsel

/s/ RONALD J. WILLIAMS

RONALD J. WILLIAMS, Capt, USAF
Individual Military Counsel

SOURCE AND TARGET MANAGEMENT RECORD

MAKE LEGIBLE ENTRIES BY HAND OR
TYPEWRITER

FILE NO. DETACHMENT NO. TITLE BLOCK
Det 1803 (Complete for recruitment or changes)

PROGRAM NICKNAME (if applicable) SEVEN		EDWARD GLENN SCHEFFER Male Born: 16 Nov 70, CA AIC, FR 554-85-0300 22 Transportation Sq (SAC) March AFB, CA	
CHECK APPLICABLE BLOCKS			
XX OPEN OR REOPEN (TERMINATE ROUTINE REPORTS (ATTACHMENTS No (AFOSI FORM 38 Yes (AFOSI FORM 39		AFSC: 47232 RACE: CAU	
TRANSFER TO: (PCS/DISCH ORDER			
TARGET(S) NARCOTICS			

INFORMATION (Received, levies, notes)

- HOME ADDRESS: Bldg 976, Rm 109, March AFB, CA
- DUTY PHONE: 655-5023
- CELL PHONE: 328-7638

- POV: Ford Ranger/green/brown trim
- license #: Unk
- HA: SA ROBERT H. SHILAIKIS
- AHA: SA DAVID P. RITER
- DCII RESULTS:

9. BACKGROUND: SOURCE was brought to Det 1803 by his 1st Sgt because SOURCE stated he had information concerning narcotics. SOURCE provided no information pertaining to narcotics and in our opinion used the excuse to talk to OSI in hopes it would get him out of trouble with his squadron. MSgt ROBINSON, SOURCE'S 1st Sgt, advised that SOURCE has been continually late for duty. On 10 Mar 92, SOURCE was again interviewed concerning narcotic information. SOURCE again provided no information advantageous to OSI. SOURCE did consent to the search of his person, residence and the seizure of his urine for the purpose of chemical analysis. AGENT NOTE: On 6 Apr 92 it was found that SOURCE's urine was secured in the evidence room, but not sent out to the laboratory. SOURCE did refuse consent to search his vehicle. It is still unclear as to why. No contraband or paraphernalia [illegible] found in any of the searches. SOURCE was told that if he came across any information relevant to contact HA. On 3 Apr 92, SOURCE contacted HA telephonically and provided the following information: SOURCE stated there was a "big deal going down". When questioned further it was determined SOURCE grew up with a white male named ROBERT DAVIS who [in] traffics methamphetamine. DAVIS buys his product from BILLY (NFI). BILLY receives his shipments from

Mexicans down south (NFI). SOURCE was instructed to tag along and provide intel to HA on 6 Apr 92. SOURCE was told to find out what the cost of 1/8 oz would be. SOURCE stated BILLY would only deal in oz's and above. SOURCE stated that it would cost \$650.00 per oz. On 6 Apr 92, SOURCE contacted HA telephonically. SOURCE was instructed to meet with HA and AHA at 1200 hrs same day. SOURCE was met and provided an abundance of information. SOURCE showed HA and AHA w[h]ere BILLY resides. AGENT NOTE: On 6 Apr 92, TOM SALSBERY, West End County Task Force, Riverside, CA, further identified BILLY as BILLY FINK who resides on Una street off of Markham. FINK is on felony probation for

[Right Margin]

ADMINISTRATIVE DATA *(Agent name, date, cost, pertinent file numbers)*

3-7 Apr 92

HA: SA SHILAIKIS

AHA: SA RITER

COST: \$18.21

SPECIAL HANDLING REQUIRED
FOR OFFICIAL USE ONLY

methamphetamine sales. SOURCE was also asked if he has ever seen a lab which he replied yes. SOURCE was asked if he knew what chemicals were used to make meth which he replied, acetic acid, ephedrin and R-11 to gas the product. This information is consistent with methamphetamine labs. SOURCE consented to provide a urine specimen but could not produce. SOURCE agreed to provide a urine specimen on 7 Apr 92. On 7 Apr 92, SOURCE provided a consensual urine specimen. It was learned that SOURCE was late to work. SOURCE stated he went to DAVIS' apartment on 6 Apr 92 and left there at approx 1230 hrs. SOURCE stated the last thing he remembers is being on Alessandro Blvd. SOURCE stated he woke up on the 215 freeway at a rest stop with his doors to his truck open and his personal belongings thrown around. SOURCE stated nothing was missing. When asked, SOURCE stated he was fine, that he was coherent, and that he didn't need a doctor.

10. MOTIVATION: SOURCE'S motivation stems from two apparent avenues. Even though he has been told on numerous occasions that we (OSI) can not promise him anything, he feels we can help him PCS from March [AFB]. It is in the opinion of the HA that he also feels by playing both sides of the fence (OSI vs Transportation) he will be able to get out of some trouble.

11. LAC: No derogatory information found.

12. HANDLING PROBLEMS ANTICIPATED: Yes. SOURCE is an embellisher of the truth. He likes to have an audience. But he has thus far conducted all levies tasked expediently. He is very knowledgeable concerning methamphetamine.

SOURCE has stated over and over that he does not use or distribute. SOURCE has provided two consensual urinalysis and is scheduled for a polygraph examination on 10 Apr 92. Before using SOURCE to conduct controlled buys, SOURCE will be tested on a confidence buy. Through strict levies and a tight rein SOURCE could possibly produce major narcotics cases.

13. MEDICAL RECORDS REVIEW: A review of SOURCE's medical records was conducted on 6 Apr 92 by Col FOODY, 22d Medical Group for the purpose of polygraph examination. No information was found to preclude SOURCE from being examined.

14. CONTACTING INSTRUCTIONS: SOURCE is to contact HA by beeper and phone at least twice per week.

15. USM COMMENTS: HA is the USM. Concur.

16. DETCO COMMENTS: Concur with HA and USM. Treat with care. Always meet SOURCE with two agents.

17. BRIEFINGS PROVIDED: SOURCE was briefed on the following: AFR 205-57, Entrapment. SOURCE also read, understood and signed a declaration of agreement.

SOURCE AND TARGET MANAGEMENT RECORD

MAKE LEGIBLE ENTRIES BY HAND OR
TYPEWRITER

FILE NO. DETACHMENT NO. TITLE BLOCK

1803

(Complete for recruitment or changes)

PROGRAM NICKNAME (if applicable)
SEVEN

CHECK APPLICABLE BLOCKS

OPEN OR REOPEN TERMINATE

X ROUTINE REPORT ATTACHMENTS
AFOSI FORM 88

TRANSFER TO: AFOSI FORM 39
PCS/DISCH ORDER

TARGET(S)

INFORMATION (Received, levies, notes)

On 10 Apr 92, Source, after advisement of rights and signing a Statement of Consent to Polygraph related the following:

Source states he has been up front with OSI and hasn't lied about the drug information he's provided. He also stated he hasn't used any illegal drugs since entering the AF. He related he told his parents about his work with OSI. When discussing his past, Source stated he used meth quite a bit before coming into the AF and lied on his enlistment forms about his drug use.

The following relevant questions were asked:

a. Since you've been in the AF, Have you used any illegal drugs? no

b. Have you lied about any of the drug information you've given OSI? no

c. Besides your parents, have you told anyone you're assisting OSI? no

Analysis of the charts indicated no deception to the above questions.

The Statement of Consent and allied polygraph data are on file at Hq AFOSI.

[Right Margin]

ADMINISTRATIVE DATA (*Agent name, date, cost, pertinent file numbers*)

/s/ J. BLACK
SA J. BLACK

10 Apr 92
AFOSI Dist 18
Norton AFB, CA

SPECIAL HANDLING REQUIRED
FOR OFFICIAL USE ONLY

SOURCE AND TARGET MANAGEMENT RECORD		
MAKE LEGIBLE ENTRIES BY HAND OR TYPEWRITER		
FILE NO.	DETACHMENT NO.	TITLE BLOCK
	Det 1803	(Complete for recruitment or changes)
CHECK APPLICABLE BLOCKS		
<input type="checkbox"/> OPEN OR REOPEN <input type="checkbox"/> TERMINATE		
<input type="checkbox"/> ROUTINE REPORTS <input type="checkbox"/> ATTACHMENTS		
IAFOSI FORM 38		
IAFOSI FORM 39		
TRANSFER TO: <input type="checkbox"/> PCS/DISCH ORDER		
TARGET(S)		
NARCOTICS		

INFORMATION (*Received, levies, notes*)

INFORMATION: Results from AFDTL on SOURCE's consensual urinalysis results revealed SOURCE's urine positive for methamphetamine.

NOTE: This information confirms HA's suspicions of SOURCE being a pathological liar. SOURCE came up non-deceptive on his polygraph, but yet was using narcotics while providing info to AFOSI. SA Black, AFOSI Dist 18/Polygraph was notified concerning SOURCE's urinalysis results.

ADMINISTRATIVE DATA (*Agent name, date, cost, pertinent file
numbers*)

14 May 92

HA: SA SHILAIKIS

COST: NA

SPECIAL HANDLING REQUIRED
FOR OFFICIAL USE ONLY

DEPARTMENT OF THE AIR FORCE
IN THE FIFTH JUDICIAL CIRCUIT

UNITED STATES

v.

AMN EDWARD G. SCHEFFER
FR554-85-0300
22 Transportation Squadron
March AFB, California

UNITED STATES RESPONSE TO DEFENSE
MOTION TO ADMIT POLYGRAPH RESULTS

NATURE OF MOTION: In response to the Defense Motion to Admit results of the polygraph administered to the accused, the United States contends that polygraph results are inadmissible evidence under M. R. E. 707 and that the Defense Motion should therefore be denied.

SUMMARY OF FACTS: The United States does not adopt all of the facts from the accused's summary of facts, but we do adopt the following: On 7 April 1992, the accused provided a consensual urine sample to the OSI from Det. 1803, March AFB. The sample was sent to Brooks AFB laboratory, and tested positive for methamphetamine. On 10 April 1992, OSI SA Black from District 18, Norton OSI administered a polygraph test to the accused.

DISCUSSION: The United States contends that the state of the law regarding the admissibility of polygraph results is clearly stated in the Military Rules of Evidence 707, which states that "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." The rule was promulgated effective 6 July 1991, in the form of an amendment to the MCM.

The Defense motion relies on two main arguments: First, that *U.S. v. Gipson*, 24 M.J. 246 (CMA 1987) "recognizes the argument that the accused has a constitutional right to present exculpatory evidence which is relevant and helpful" (Id. at 252), and secondly, that per se rules regarding the inadmissibility of evidence, such as M.R.E. 707, may be violative of due process.

The Defense motion cites the *Gipson* court statement that the majority "recognizes" the constitutional argument that the accused has a right to present evidence, but in the paragraph that follows that citation, the court makes clear that they do not subscribe to that argument. The court states that "There can be no right to present evidence—however much it purports to exonerate an accused unless it is shown to be relevant and helpful" (Id. at 252). That is, the court believed that there is no independent constitutional right to present exculpatory evidence, unless it comports with the Federal Rules of Evidence for relevancy and helpfulness. The Defense also cited the court for the suggestion that for due process reasons, judges should bend to give the accused the benefit of

the doubt. In the actual context of the opinion, the *Gipson* majority opinion was that due process may be satisfied by working within the federal rules, not outside of them. The court noted, while disagreeing with the theory that the accused has an independent constitutional right to present *any* evidence, that due process "... has an impact in two respects. ..." The court then implies simply that judges should be more flexible when deciding whether the federal rules regarding relevancy and probative value have been satisfied by the accused. But certainly, the *Gipson* court at no point held that the federal rules do not apply, or subscribed to the notion that the accused has an independent constitutional right to present evidence, including favorable polygraph evidence, outside of the federal rules.

The *Gipson* opinion was more of a search for coherence in the federal rules, as opposed to a decision that created a new independent constitutional right outside of the Federal rules. The decision was made in 1987 in the context of the failure by the drafters of the Federal Rules of Evidence and the Military Rules of Evidence to provide any guidance on the *Frye* test of admissibility of polygraph results based upon acceptance in the scientific community. In *U.S. v. Howard*, 24 M.J. 897 (1987), the court opinion notes that the per se ban on the admissibility of polygraph results, set out in a long line of decisions since the 1923 *Frye* decision, was mirrored in the 1969 MCM in paragraph 142(e), but that the per se rule was not addressed in the 1984 MCM. Thus, the courts from 1984 until 1991, were left to interpret the federal rules that remained. Thus, with no guidance regarding their approach to the question of polygraph

admissibility, the court turned to the guidance laid out in MRE 401-403, and 702. The *Gipson* court, in searching for coherence in the rules, noted that the four federal rules on which it was relying "... seem to describe a comprehensive scheme. . . Such a scheme is within the President's authority to promulgate rules of evidence for courts-martial." (Id. at 251). *Gipson* and its progeny are all attempts to work within the federal rules and not attacks on the rules on due process grounds. In fact, in the final noteworthy decision on point prior to July 1991, *U.S. v. Rodriguez*, 34 M.J. 562 (1991), the majority states in footnote 1 that Rule 707 now governs all decisions regarding polygraph admissibility for cases in which arraignment occurred after 6 July 1991.

The defense motion cited the following three cases, also cited in the *Gipson* decision, for their due process argument: *Chambers v. Mississippi*, 41 U.S. Law Week 4266 (1973), *Washington v. Texas*, 388 U.S. 284 (1973), and *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37, 55 U.S. Law Week 4925 (1987). None of the cases cited are directly on point specifically regarding polygraph evidence.

In *Chambers*, the per se exclusionary rule at issue forbade cross-examination of a witness, whereas in *Rock*, the rule at issue barred hypnotically refreshed testimony by the accused himself. The *Washington* case also addressed a per se rule that forbade testimony by persons charged as principals, accessories, or accomplices in the same crime as the accused from testifying in the trial. In all three cases, the courts focused on the constitutional right of an accused to testify and to face his accused. Each of the per se rules in the three cases involved the right of the

accused either to provide direct oral testimony or to cross-examine his accusers. The decisions in all three cases underscored the constitutional import of these constitutional rights, as indicated in the *Chambers* decision which notes that "The right to confront and cross examine witnesses and to call witnesses in one's behalf have long been recognized as essential to due process" (Id. at 4269). The *Washington* court also referred to the constitutional right of the accused to cross-examine witnesses, but it is noteworthy that even with a right as recognized as this, the court also stated that such a right still "is not absolute and may in appropriate cases bow to accommodate other legitimate interests. . . ." The *Rock* case is also cited for the theory that due process issues become a consideration when a rule "infringes impermissibly on the right of a defendant to testify on his or her own behalf" (Id. at 4930). But it is important to note that in one of the polygraph line of cases, *U.S. v. West*, 27 M.J. 223 (CMA 1988), the court cites *McMorris v. Israel*, 643 F.2d 458 (1981) in its response to *Rock*, by quoting the following: "Regardless of these principles, the right of an accused to present evidence in his defense must still yield to established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt or innocence."

The *Chambers* court also states the right to confront one's accusers is not absolute, and referred to the traditional rationale for per se rules that exclude out-of-court statements by stating that "Out-of-court statements are traditionally excluded because they lack the indicia of reliability: they are usually not made under oath or other circumstances that impress

the speaker with the solemnity of his statements; the declarant's word is not subject to cross examination; and he is not available in order that his demeanor and credibility may be assessed by the jury (Id. at 4270)." This concern would be especially strong with polygraph results. The *Rock* decision itself notes that "numerous state procedural and evidentiary rules control the presentation of evidence and do not offend the defendant's right to testify" (Id. at 4928), and then proceeds to cite *Chambers* and *Washington* for the same theory.

The Defense is also proceeding on the notion that the results of a polygraph test may be compared with the constitutional rights at issue in the three cases cited, that is, the rights to testify and cross examine one's accusers. The three cases cited by Defense all rely on the rights inherent in the Sixth Amendment, but those rights to testify and cross examine cannot be logically compared to the admission of the results of a polygraph test. The reliability inherent in oral testimony provided in the presence of the factfinder versus the faith one would have to place in the functioning of a polygraph test is overwhelming by comparison.

The Defense also seems to forget that admissibility of polygraph results was a "two way street" from 1987 to 1991, and therefore the drafters certainly had an opportunity to consider the due process arguments of the accused on presenting exculpatory evidence, and balance that with the threat that polygraph results could also be used against an accused. It is the unreliability of the polygraph, and the threatened perception of the machine as a "lie detector" on the part of juries that keeps the polygraph out of the

courts. The rationale of the drafters is just as likely to protect an accused from admission of damning evidence, than to affect his ability to present a defense.

The Defense also cites the Appendix to the 1991 amendments to MRE 707, in the argument that the per se rule prohibits the court from its ability to judge the reliability of each individual polygraph on a case by case basis. The best response to this particular argument is in the Appendix itself which states that a very real fear on the part of the drafters "[Was that admissibility of polygraph results] could result in the court-martial degenerating into a trial of the polygraph machine."

The rules of evidence are to be construed, as stated in MRE 102, to "secure fairness in administration . . . and the promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Although Rule 102 should not be read by itself, if read in conjunction with the explicit rationale provided in MRE 707, the concerns expressed in both rules for avoiding needless delay and expense and enhancing factfinding further underscore the fact that the drafters considered the arguments and put MRE 707 in place to protect against unreliable evidence.

The Appendix to MRE 707 states that the per se rule is modeled on California Evidence Code 351.1, which creates a per se bar on polygraph evidence in all criminal and juvenile proceedings. Several other states, and cases from every Circuit have adopted per se rules against admission of polygraph evidence for the very same fears as those set out in the Appendix to 707, that is, the fear of unreliability, confusion, and

the threat to the "integrity of the judicial system" should such evidence be admitted.

CONCLUSION: MRE 707 prohibits the use of polygraph evidence in courts-martial. The rationale supporting the rule, found in case law and in the federal rules themselves, clearly states that such evidence is unreliable and poses a threat to the integrity of the court-martial. All of the case law, including those cases cited by the Defense, states that the right to present evidence is not absolute, but that evidence must satisfy those evidentiary and procedural rules that exist to protect the criminal process. We therefore respectfully request that the polygraph results of the accused be declared inadmissible in the court-martial in question.

Respectfully submitted,

/s/ EDWARD J. DAMICO
EDWARD J. DAMICO, Lt., USAF
Assistant Trial Counsel

DEPARTMENT OF THE AIR FORCE
IN THE FIFTH JUDICIAL CIRCUIT

UNITED STATES

v.

AMN EDWARD G. SCHEFFER
FR554-85-0300
22 Transportation Squadron
March AFB, California

Military Judge's Ruling on Accused's
Polygraph Motion (Record of Trial)

* * * * *

[42] MJ: * * * Polygraph exam, defense counsel, do we need any evidence on that?

DC: As to the polygraph motion, Your Honor, we think that we don't need to call any live witnesses, and that the evidence that we have produced, those three Air Force OSI Form 14s attached to the motion, clearly show that a urine sample was obtained on the 7th of April 1992, that there was a so called exculpatory polygraph given to Airman Scheffer on the 10th of April 1992, and that apparently the urine sample came back positive. The results of the urinalysis, or the purported results of the urinalysis, don't jive with the results of the exculpatory polygraph. We think that the [43]

documents speak for themselves, and we don't need to provide any testimony on this, sir.

MJ: Is Airman Scheffer planning to testify regarding that specification on the merits?

DC: Your Honor, are you asking whether Airman Scheffer intends to testify in the case in chief?

MJ: Right.

DC: We are not prepared to disclose that, sir.

MJ: What about *U.S. versus Abeyta* which indicates that polygraph results would only be relevant if he did testify, and was asked the same question that he was asked on the polygraph.

DC: Your Honor, may I please ask you for the cite to *U.S. versus Abeyta*?

MJ: 25 MJ 97, Court of Military Appeals, 1987.

DC: May we take a three minute recess, Your Honor.

MJ: Certainly. I'm going to stay right here, but court will be in recess.

(The Article 39(a) Session recessed at 1055 hours, 14 October 1992, was called to order at 1105 hours, 14 October 1992, with all parties present when the court recessed again present.)

MJ: Court will come to order. Please be seated.

ATC II: All parties who were present when the court recessed are again present. The members are absent.

MJ: Captain Kurlander?

DC: Your Honor, we are interested in a preliminary ruling from you on this point, because that is going to make some difference as to whether or

not Airman Scheffer testifies as to the charge in question. Right now, though, we anticipate that Airman Scheffer will be testifying as to the charge in [44] question, because we have earlier—some time ago—put the government on notice that we are anticipating using an innocent ingestion defense in this case. Therefore, we are asking for this preliminary ruling from you now as to whether or not the defense would be entitled to attempt to lay the foundation for the admissibility of polygraph methods, because whether or not the accused testifies, is in a large measure going to be determined by your ruling on this point.

MJ: All right. With the understanding then that, if Airman Scheffer does not testify or does not testify as to the same things he said to the polygraph examiner, it wouldn't be relevant, and therefore there wouldn't be an issue. I will go ahead and rule on it. Do you want to go ahead and make your argument.

DC: Your Honor, may we have one moment, please?

MJ: Sure.

(Defense counsel conferred with individual military counsel.)

DC: Your Honor, I just want to make clear that right now we do intend to call Airman Scheffer as a witness, as to the drug charge. In terms of argument, I'd say, Your Honor, that the *Gipson* case is clear. We believe that the President's promulgation of Military Rule of Evidence 707 really is unconstitutional if it prohibits an accused from introducing relevant and helpful

exculpatory evidence. That's why we want to lay the foundation for the polygraph, to show that in this particular case, Your Honor, the polygraph results are relevant and helpful. We're not saying an accused has an independent and constitutional right to present polygraph evidence. We're only saying that, given the court's due process concerns, that the road should be a tad bit wider for the defense, and that we should be permitted to lay the foundation to show that the results of this particular test are relevant and helpful in this case. We think that *Gipson* therefore, is controlling, Your Honor, and that a constitutional right takes precedence, in this case, to Military Rule of Evidence 707. We think that we should be permitted to lay the foundation.

[45]

MJ: I want to make it clear, Captain Kurlander, if I didn't before, that I am going to give you a preliminary ruling on that, only with the understanding that if you decide your client is not going to testify then there isn't any issue. I'm going to wait and see if he does, and then I will rule.

DC: I understand that, Your Honor.

MJ: So, you need to understand that I recognize—I don't know what kind of evidence the government may have, but you may have some sort of a Hobson's choice here in that the relevant question is "Have you ever used drugs in the Air Force?" You may open the door to some uncharged misconduct if he wants to testify

about that. That is the choice you are going to have to make.

DC: I understand that, sir.

MJ: Okay. Trial counsel, argument?

TC: Your Honor, we will rest on our brief.

MJ: All right. For purposes of the motion the court will consider the following facts:

That the accused provided the urine sample on the 7th of April 1992, which later tested positive for methamphetamine.

On the 10th of April 1992, the accused was administered a polygraph exam by the OSI, and asked the question, "Since you have been in the Air Force, have you used any illegal drugs?" He responded negatively. The Polygrapher's opinion was that no deception was indicated in that answer.

In *Gipson*, the Court of Military Appeals indicated that there was no constitutional right to present evidence unless it was relevant and helpful, leaving open, arguably, the question of whether the President can determine for all cases that it's never relevant and helpful; at least that it's never helpful or just determine that it was never relevant, or whether there is some constitutional right to present that [46] evidence. The case law that I have reviewed, finding a constitutional right to present polygraph evidence is not particularly persuasive. It tends to be from some of the trial courts.

As I indicated earlier, the evidence is relevant only if the accused testifies consistently with his answer—

he testifies and answers the same question that he did on the polygraph.

For evidence to be helpful, the testimony of the polygrapher would have to be an area in which the fact finder himself needs help in making a decision. It would have to be the result of a process with sufficient scientific acceptability to be relevant. The *Frye* test is not the test anymore; that sort of analysis is helpful in deciding whether at least there is sufficient scientific acceptance of the process that the evidence is relevant.

Lastly, the equipment, the operator, the questions and the circumstances have to be sufficiently reliable to be helpful to the trier of fact. It seems to me that only the third of those three issues is case specific. Therefore, the President may, through the Rules of Evidence, determine that credibility is not an area in which a fact finder needs help, and the polygraph is not a process that has sufficient scientific acceptability to be relevant.

The other concern about polygraph testimony is Military Rule of Evidence 403. The fact finder might give it too much weight, and that there is an inordinate amount of time and expense, especially in the cases where there may be conflicting tests, which doesn't appear to be the case here.

The main confusion of the issue; that is, the question of what the result of the polygraph was, as opposed to the question of whether or not the accused used drugs.

Given those concerns, I don't believe that the constitution prohibits the President from appropriately

ruling that polygraph evidence will not be admitted in a court-martial.

So, your request to lay a foundation for the admission of polygraph evidence in this case is denied.

* * * * *

DEPARTMENT OF THE AIR FORCE
IN THE FIFTH JUDICIAL CIRCUIT

UNITED STATES

v.

AMN EDWARD G. SCHEFFER
FR554-85-0300
22 Transportation Squadron
March AFB, California

EDWARD G. SCHEFFER'S TESTIMONY

* * * * *

[288] IMC: Your Honor, at this time we would call
Airman Scheffer.

EDWARD G. SCHEFFER

was called as a witness in his own behalf, was
sworn and testified as follows:

Questions by trial counsel.

- Q. State your name, rank and your organization.
- A. My name is—Airman Edward G. Scheffer. I
work for the 22d Transportation Squadron. I am
21 years of age.
- Q. You are the accused in this case, correct?

A. Yes, sir.

DIRECT EXAMINATION

Questions by individual military counsel.

- Q. Airman Scheffer, during the month of March and
April, did you work for the OSI?
- A. Yes, sir, I did.
- Q. When did you start working for the OSI?
- A. Approximately 5 March, sir.
- Q. What did the OSI want you to do for them?
- A. They wanted me to build a relationship, a
trusting relationship, with various drug dealers.
- Q. Why did they want you to build these
relationships?
- A. So they could operate sting operations on them.
- Q. And did you do that for the OSI?
- A. Yes, sir, I did.
- [289] Q. How did you build these relationships?
- A. By going to these people, mostly people that I
knew, speaking with them, just trying to build a
relationship that had been lost over the years —
as being friends, helping them work on their
cars, on their stereos, watching movies and stuff
like that.

Q. Did the OSI in particular, ask you to build this kind of a relationship with Robert Davis?

A. Yes, sir, they did.

Q. What did you do with Robert Davis to build this relationship?

A. Robert Davis and I had been friends in the past. So, I knew pretty much what he liked to do. We worked on his car a lot, built stereos for cars and talked a lot. Built back a friendly relationship.

Q. How much time did you spend with Robert Davis from the time that you started working for the OSI, around the 5th of March, until, let's say, the 7th of April or so?

A. A lot, sir.

Q. Roughly, an estimate. How many times a week would you see him?

A. Five times a week, sir; six times.

Q. What would you do?

A. We would—as I said before, we would work on his car, or his stereo, eat dinner, eat lunch, possibly breakfast, depending on when I was there, sat around and talked, and stuff like that, sir.

Q. Now, when you were at Robert Davis' house, were there ever any drugs there?

A. All the time, sir.

[290] Q. Did he ever do anything with the drugs?

A. Yes, sir. He sold them. He weighed them. He used them himself.

Q. Did the OSI ever have you buy any drugs from Robert Davis?

A. Yes, sir, they did.

Q. Let's focus on the time when you starting developing this relationship with Robert Davis, and about the 7th of April, I imagine that you spent time with him—helped him with his stereo, his car and you ate with him—what kind of stuff would you guys eat together?

A. Sir, on an average we were all pretty much addicts to Taco Bell and Del Taco. So, we would eat at least two meals a day there. We would eat tacos, burritos; we would get these big 48 ounce cokes—that was a normal meal.

Q. And who would buy the stuff?

A. Myself, Robert Davis or somebody else that was around—his girlfriend or one of other friends would go pick something up.

Q. What would you do with it? Would you eat it there?

A. They would bring it back to us. Whoever would normally go and get it, would pay for it and—it wouldn't be like taking up a collection or anything like that—they would bring it back, and then we would all sit around and eat.

Q. At anytime when the food had been brought back, were there any drugs lying out around Robert Davis' house when you had food out?

A. Many occasions, yes, sir.

Q. Were there—were you always—did you always sit down and finish everything you had on your plate at one sitting, or did you ever get up?

A. No, sir. There was many times where I went to the bathroom, [291] or I wasn't really in a hurry to eat, or I wasn't that hungry, or we needed something, or we wanted to do something else—I would go and set that up, or go pick something up. I would leave my coke there and some of my food there. There were a lot of times where there was still stuff sitting around.

Q. Now, you mentioned that Robert Davis had a lot of drugs around; did you ever see him transport these drugs anywhere?

A. Yes, sir, I did. There were a few times when—mentioned Mr. Fink—we had went out to his house. When we were coming back, he had like a hide-a-can; it was like a haveling can with a screw off top. A lot of times that is where he would put his drugs, and he would transport them in and out like that.

Q. Now, at anytime between the time you started working for the OSI and the 7th of April when you took the urinalysis for the OSI, did you ever knowingly ingest methamphetamine?

A. No, sir, I did not.

IMC: Thank you. No further questions.

MJ: Captain Murphy?

TC: Your Honor, was the question, up until 7 April 1992?

IMC: Up until the time that he took the urinalysis—

TC: I think you said 7 April. That is what I am confused about.

IMC: I believe 7 April 1992, was the date, Your Honor.

TC: Your Honor, we would like a 39(a).

MJ: Members, would you excuse us for a few minutes please.

(The Members withdrew from the courtroom.)

(The court recessed at 1415 hours, 16 October 1992.)

* * * * *

[304] MJ: Captain Murphy, cross examination?

TC: Thank you, Your Honor.

CROSS EXAMINATION

Questions by trial counsel.

Q. Airman, you approached the OSI about the information regarding Robert Davis, isn't that correct?

- A. Yes, sir.
- Q. And you also approached the OSI about information regarding Fink, isn't that correct?
- A. Yes, sir.
- Q. Prior to that, they didn't know anything. You are the one that provided them with that information what these guys were doing, correct?
- A. Yes, sir.
- Q. Now, are you aware of what the effects of methamphetamine are in a human body?
- A. Yes, sir.
- Q. What are those effects?
- A. Dilation of pupils, anxiety, loss of hunger, insomnia, and extreme agitation.
- Q. Have you ever used methamphetamine prior to entering the [305] service?
- A. Yes, sir.
- Q. So, you are aware of those effects personally in your body?
- A. Yes, sir.
- Q. Did any of those effects on your body include blackouts?
- A. Not that I can recall, sir.

- Q. Now, let's go to the evening of April 7th—first the day before, April 6th, 1992. Special Agent Shilaikis asked you to provide a urine sample, that is correct, isn't it?
- A. No, sir.
- Q. That's what he testified to, isn't it?
- A. I believe that's what he has testified to, sir.
- Q. What's the truth on that? What's your version of that?
- A. Sir, my recollection is that Agent Shilaikis asked me, as he dropped me off here in Moreno Valley, if I needed to go to the bathroom. I stated, "No." Then he said, "Okay, why don't you just go ahead and come in first thing in the morning or give me a call before you come in first thing in the morning." I said, "All right." That was the end of the conversation. I called him the next morning around 7:30, reported around 8:00 o'clock and gave the urine specimen.
- Q. So, when Special Agent Shilaikis asked you to provide a urine sample and you said, "I only urinate once a day", he was mistaken or lying about that?
- A. He was mistaken; I do only go very few times—twice a day was my answer to that, sir.
- Q. So, his testimony was mistaken?
- A. Yes, sir.

[306] Q. Nevertheless, you were aware, prior to 7 April 1992, that you would be providing a urinalysis sample, is that correct?

A. Yes, sir, it is.

Q. It was your idea to visit Robert Davis that evening, isn't that correct?

A. On the 6th, sir?

Q. On the evening of the 6th.

A. I cannot recall if I was told to talk to him or on my own, sir.

Q. Special Agent Shilaikis testified that you told him that you would like to go up to Davis' place that evening. Do you recall that testimony?

A. Yes, sir, I do.

Q. Are you saying that, once again, Special Agent Shilaikis is mistaken or inaccurate in his recollection?

A. No, sir, I'm not.

Q. You just don't recall?

A. I don't recall.

Q. So, it certainly is possible that it was your idea to go to Robert Davis' home that evening?

A. Yes, sir.

Q. Did you, in fact, go to his house?

A. Yes, sir.

Q. What time did you arrive at his home?

A. 6 or 7 in the evening, sir.

Q. How many individuals were at his home?

[307] A. I would say four or five, sir.

Q. Was there methamphetamine present in his home that you observed?

A. Yes, sir.

Q. What did you have to consume at his home?

A. Sir, we normally eat, as I stated before, from Del Taco or someplace like that. That is what we consumed that evening. We had went to Del Taco and brought home burritos, tacos and cokes, sir.

Q. Did you eat at his home, or did you eat at Del Taco?

A. No, we ate at his home, sir. That was almost always where we ate.

Q. Did you eat anything else?

A. Not to my recollection.

Q. You normally ate Del Taco food?

A. Sir?

Q. You normally ate Del Taco food?

A. That night, sir?

Q. Yes.

A. Yes, if my recollection served me right, yes, sir.

Q. Do you recall making a statement to the OSI on the 7th of April?

A. A statement?

Q. Yes. A typewritten statement.

A. Yes, sir.

[308] Q. Would it surprise you that you stated in that statement you ate some pizza from Little Caesars and drank two cokes?

A. That's possible, sir. Like I said, that was the best of my recollection.

Q. Well, pizza is a little different than eating Del Taco food?

A. That's what I said, on the average we ate Del Taco food.

Q. Are you satisfied with probably pizza?

A. If that's what I wrote down, yes, sir.

Q. Do you recall how much pizza you ate?

A. No, sir.

Q. When you ate the pizza, did the pizza taste different or anything of that nature?

A. No, sir.

Q. When you drank the cokes, do you recall tasting anything different in the coke?

A. No, sir.

Q. Was it regular coke or diet coke?

A. Regular coke, sir.

Q. How about the second coke, anything unusual?

A. I don't know. I always drink regular coke.

Q. Did you taste anything in the coke?

A. Not to my recollection.

Q. When you were done eating, that statement then indicates that you went to Del Taco alone and bought another coke. Do you recall that?

[309] A. No sir. But, I probably did.

Q. Do you think if you looked at the statement, that may refresh your recollection?

A. It could, sir.

TC: Your Honor, I will mark that as Prosecution Exhibit 10 for identification.

(Trial counsel handed Prosecution Exhibit 10 for identification to the accused to review.)

(Questions continuing by trial counsel.)

Q. Take a look at that, and see if that will refresh your recollection about what you ate and drank that evening. Does that refresh your recollection about what you ate and drank that evening?

A. Yes, sir, somewhat.

Q. You don't have any reason to believe that Del Taco puts methamphetamine in their cokes, do you?

A. No, sir, I do not.

Q. Now, after you left Del Taco, I guess you were on your way home, is that right?

A. Yes, sir. On my way back here to the base.

Q. What happened then?

A. Sir, I came up to Allessandro—I worked my way from Corona back here to Moreno Valley. I got up here to the stop light at Allessandro, and that is honestly the last thing that I can remember until I figured out that I was somewhere in Barstow. I have no idea how I got there. To this day, it still worries me. It scares me.

Q. Prior to that time, did you feel any sudden rush of energy?

[310] A. No, sir, I did not.

Q. Did you feel any anxiety or anything?

A. No, sir.

Q. After you woke up, did you feel any energy or rush?

A. No, sir. I was, of course, highly nervous about where I was and why I was there, and how I got there. That was my being paranoid.

Q. So, you were paranoid about what happened to you?

A. I was scared, sir, more than paranoid.

Q. So, when Special Agent Shilaikis described you as being nervous and anxious, that was a result of the fact that you didn't know where you were?

A. Yes, sir.

Q. Nothing to do with the fact that you had taken methamphetamine?

A. Sir, I didn't take methamphetamine to my knowledge.

Q. So, it had nothing to do with that, right?

A. Yes, sir.

Q. Let's go back to the time before that. Prior to the evening of the 6th of April, when you went to Billy Fink's home. When was the next time prior to that?

A. The time prior to what, sir?

Q. The 6th of April; the 6th of April is when you were asked to provide the consensual

urinalysis, or Special Agent Shilaikis testified he asked you to provide a consensual urinalysis. Then that evening, you went to the Davis' home?

A. Yes, sir.

[311]

Q. Prior to that, when was the first time or the last time you were to Davis' home prior to that?

A. The last time?

Q. Yes.

A. I believe, the night before, sir. I'm sorry, that evening.

Q. So, you had gone there on the night of the 5th?

A. Yes, sir.

Q. Did you eat anything the night of the 5th?

A. As I stated once before, sir, every time I went over there, I always ate. Because there was normally a meal I was going to miss if I didn't eat something. So, yes.

Q. Do you recall tasting anything unusual in anything that you ate?

A. No, sir.

Q. Do you recall experiencing any sudden burst of energy or sudden rush?

A. No, sir.

Q. Do you recall drinking anything that tasted bitter?

A. No, sir.

Q. How about before that, when was the next time you visited Fink's home?

A. Sir, again as I stated once before, I was there almost every night. That was Davis', sir. So, like I said, I was there almost every night or evening. As soon as I got off work, or anytime that Agent Shilaikis had me come from the Transportation Squadron to his office, and then he would send me out, whether it was 8:00 o'clock in the morning, or 1:00 o'clock in the afternoon, or 10:00 o'clock at night. It was [312] almost always one meal a day, sometimes two.

Q. So, to the best of your recollection, for at least a week prior, you spent everyday at Davis' home?

A. I can't recall if it was everyday, sir. I can't recall that.

Q. During any of those meals, did you feel any sudden rush of energy?

A. No, sir.

Q. Did you feel any burst of energy?

A. Again, not to my recollection, sir.

Q. Taste anything unusual in the food?

A. Again, no, sir.

Q. Now, you told Special Agent Shilaikis that both Davis and Fink were big time drug dealers, right?

A. Yes, I did.

Q. In fact, you told him that Fink dealt in pounds of methamphetamine?

A. Yes, sir, I did.

Q. And they didn't find anything in Fink's home, did they?

A. I was told, no, sir.

Q. They didn't find anything in Davis' home either?

A. From what I was told, no, sir.

TC: I have no further questions.

MJ: Captain Williams?

IMC: No redirect, Your Honor.

[313]

MJ: Questions from members of the court?

(Affirmative response from Lieutenant Piech.)

PRES:

(Lieutenant Colonel Fullenkamp) Is it possible that the initial question that I had submitted to the Special Agent could be asked, unless you would like me to rewrite it?

MJ: I think we can find it. It's Appellate Exhibit XV. The question, so that counsel can be thinking about it, was "What initiated his participation with the OSI?"

(The bailiff handed Appellate Exhibit XV and the question from Lieutenant Piech to counsel for both sides, and then to the military judge.)

MJ: Basically, that is the same question and I need to talk to counsel about that. I will hold those until we have another Article 39(a) Session, so that we don't take you out right now.

Airman Scheffer, you can return to your seat.

DC: Your Honor, I'm just curious, did you mark Lieutenant Piech's question as an Appellate Exhibit?

MJ: I think I need to do that. It's Appellate Exhibit XIX. Defense counsel, you can call your next witness.

IMC: Your Honor, we would call Mrs. Scheffer to the stand.

* * * * *

DEPARTMENT OF THE AIR FORCE
IN THE FIFTH JUDICIAL CIRCUIT

UNITED STATES

v.

AMN EDWARD G. SCHEFFER
FR554-85-0300
22 Transportation Squadron
March AFB, California

[Renewed Defense Motion Concerning
Polygraph Evidence — Record of Trial]

* * * * *

[316]

ARTICLE 39(a) SESSION

(The Article 39(a) Session was called to order at 1525 hours, 16 October 1992, with all parties present when the court recessed again present, except the members.)

MJ: This Article 39(a) Session will come to order. Please be seated.

ATC II: All parties to the trial who were present when the court recessed are again present. The members are absent.

DC: Thank you, Your Honor. At this point, it's my recollection that you gave us just a

preliminary ruling on our motion concerning the admissibility of polygraph results earlier before trial. That's my recollection, sir. At this point we would renew that motion since the accused has testified.

MJ: Maybe I phrased it that way; I'm not sure I intended to. But, at any rate, the motion is denied.

DC: Yes, sir.

* * * * *

DEPARTMENT OF THE AIR FORCE
IN THE FIFTH JUDICIAL CIRCUIT

UNITED STATES

v.

AMN EDWARD G. SCHEFFER
FR554-85-0300
22 Transportation Squadron
March AFB, California

[Closing Arguments]

Record of Trial

* * * * *

[339]

MJ: Captain Russell.

ATC I: Thank you, Your Honor.

Lieutenant Colonel Fullenkamp and members of the court, several days ago we told you that the accused was guilty in each and everyone of the offenses of which he has been charged. When we laid out the evidence, we said that we were going to present evidence to you to show beyond a reasonable doubt that the accused in this case committed all four of the offenses of which he has been charged. We've done that. What I want to do now is review the evidence that you've heard, the testimony you've heard and the

documentary evidence that you have received in order to facilitate your decision making in this process. [340] Again, let's start with Charge II, the wrongful use of methamphetamine. You heard evidence and testimony from four individuals regarding this meth use.

First, you heard testimony from Special Agent Shilaikis. Special Agent Shilaikis testified that on the 6th of April, 1992, he asked the accused to consent to a urinalysis. The accused said that he would do it, but that he was unable to urinate on that particular day—he only urinated once a day. So, Special Agent Shilaikis said we will do it the next day. Special Agent Shilaikis then testified that the accused said, "Why don't I go over to Robert Davis' house tonight?" Remember Robert Davis? This drug dealer. This individual that he is so terrified of. Well, on the 6th when he is submitting to a urinalysis, he says, "Why don't I go over to Robert Davis' house?" So, this is supposedly what happened. The next day, Special Agent Shilaikis told you, when he testified on the stand, that the accused called him and said, "I need to talk to you." He comes over. He comes over and he is animated, and says, "Where was I? Where was I?" Special Agent Shilaikis doesn't know what he is talking about. So, the accused goes into his story about going over to Robert Davis' house on the evening of the 6th, of having some pizza and cokes. Then he is driving home, returning to March Air Force Base. So, the next thing he realizes, he is on the side of the road. The car doors are open. He is lying there. He wakes up and he doesn't know how he got there. He has no idea how he got there. This is the story he gave to Special Agent Shilaikis. Again,

knowing that he would be submitting to a urine sample that day. Special Agent Shilaikis told you that he informed the accused that, again, he would like to have him consent to a urinalysis, which the accused did. Special Agent Shilaikis told you the procedures he used in obtaining that urinalysis.

First, you have the documentary evidence that he did consent to a urinalysis. You will have the urine bottle that had the accused's urine in it.

Special Agent Shilaikis, after signing the consent form, had Special Agent West—the second individual that you heard testify—act as an observer during the urinalysis. You heard Special Agent West say that he went with the accused, [341] with the bottle, to the restroom, and watched the accused directly urinate into the urine bottle. He sealed the lid on it, brought it back, handed it to Special Agent Shilaikis who then sealed it with a tamper resistant tape. Special Agent West put his initials on it. Special Agent Shilaikis put his initials on it. And the accused initialed the bottle.

At that point, Special Agent Shilaikis placed the bottle in a safe of which he and the DETCO commander were the only ones with the combination. The next day, he removed that bottle from the safe, with the tape still intact—no tampering with the bottle—and gave it to the third OSI agent you heard testify, Special Agent Evans.

Special Agent Evans then testified to the procedures that he followed. That he annotated it in the evidence log. You have that documentary evidence in front of you. That he kept it in the evidence room, where he and one other agent, Special Agent Riter,

had access to that room—nobody else had access to that room. Special Agent Evans stated that he packaged up the urine bottle on the 10th of April 1992. He prepared it for shipping, but he knew it was too late to ship it on that day. So, he returned it to the evidence room. Then on the 13th of April 1992, he took the evidence out of the evidence room, and shipped it off to Brooks Air Force Base; the lab. He stated that it was intact when he did it. The seals before he had packaged it, the seals were stills intact. There was no tampering with this bottle.

Chain of custody, here at March Air Force Base, was very secure. Each individual who handled that bottle testified. Each individual testified concerning the procedure, the process that was used, and the measures that were used to ensure that there was no tampering with that bottle.

Next, you heard from Doctor Naresh Jain. Doctor Jain testified concerning the chain of custody. He testified concerning the procedures at Brooks Air Force Base. He testified concerning checking the package that arrived. If it's damaged or broken they are going to be discarded. Of opening up the outer package, looking inside and checking each bottle, making sure that that seal is intact. If that seal is not intact, again, it is discarded. Doctor Jain, during [342] his lengthy testimony, on numerous occasions, said this chain of custody is tight. This chain of custody is secure.

Now, Doctor Jain testified at length concerning the process. There was a reason for that lengthy testimony. That was, that although the process is not

infallible, it's as close as you can get to being infallible. You heard that.

You heard the procedure of when the package arrives. It goes into a secure room. When the urine sample is going to be tested, a portion is poured out of the bottle and that sample is tested. If that sample is tested in the RIA, or radioimmunoassay, he testified here on the stand that a second confirmatory RIA is done. He said that's unnecessary forensic toxicology, but the Brooks Lab does that. So, there was a second RIA test done. Again, the accused's urine tested positive for methamphetamine. On both of those tests, Doctor Jain testified looking through the documentary evidence, Prosecution Exhibit 4, that the chain of custody was strict. Tight. Secure. No problem. So, after the first two RIA tests, he, again, testified at length concerning the third test; the GC/MS test. He testified at length to the procedures of that test. Again, chain of custody, as you recall, tight. No problem. Again, on the third test, each one being a different sample from that bottle, the accused's urine tested positive for methamphetamine.

Members of the court, there is no doubt that the urine that the accused submitted tested positive for methamphetamine. There is no doubt that that sample came from his body. Chain of custody is secure.

Now, the judge gave you an instruction, and I just want to read you part of it. It says, "If you find from the evidence beyond a reasonable doubt that the accused, did, in fact, ingest methamphetamine, you may infer that the accused's use was knowing and conscious." Then he stated, "That inference is not required on your part, but you may do so."

Members of the court, there is no doubt; in fact, we have proved beyond a reasonable doubt that the accused did, in fact, ingest methamphetamine. You may infer from that that it was knowing and conscious. [343] But, let's look again at what the accused stated. Let's look back on the 6th of April again. Let's look at his credibility and the probability of what he said occurred occurring. Again, the 6th of April. Special Agent Shilaikis asked for consent. Now, on the stand the accused said that he did not consent to the urinalysis on the 6th. Well, he is changing his testimony. Special Agent Shilaikis has no reason to get up here and lie. He told you that on the 6th he asked the accused to submit to a urinalysis the next day. He knew he was going to be tested. He has to come up with a story.

Again, we have the story of going to Robert Davis' home. The same Robert Davis that the accused, on the stand, said "I went there constantly and there was meth on the table." He told you that he ate food there, and he had some drinks. Well, why would Robert Davis or anybody that was there sprinkle methamphetamine into his food or in his drink? Special Agent Shilaikis testified concerning a controlled buy. A sixteenth of an ounce of meth costs \$80.00. Why would an individual take meth and throw it away? Why would he pull out his wallet, in essence throw away \$80.00, then not tell the accused. I mean, typically, if you are going to use meth, it's to get a kick out of it. If you are going to use it with your friends, you're going to do it together and have a good time. But, somehow some meth—throwing money away—was thrown into his food or into his drink. He never tells it. Robert Davis, on the 6th of April,—this is almost three

weeks before he is busted — he doesn't know whether the accused is involved in trying to get him. He has no motive for trying to set up the accused. He doesn't know the accused is going to go in and submit a urine sample the next day. Is he clairvoyant? He knows that, "On the 24th of April they are going to come bust me. So, I'm going to get the accused now." No. It makes no sense. He thinks you are gullible to buy that story.

The accused also testified that he felt no effects. That the day before, on the 6th, he didn't feel anything. On the 5th he didn't feel anything. He didn't feel a rush—a surge. The day before that, and the day before that. But, Doctor Jain, when he was on the stand during his testimony, told you with the reading on those tests, he would have [344] felt something. If he ingested methamphetamine, he would have felt something.

What has he told us? Robert Davis is a drug dealer. On the 24th when they go in to search Robert Davis' home, do they find the drugs, the guns and the other things that Special Agent Shilaikis testified that the accused had told him? No. They didn't find anything. Not a thing. Billy Fink. Pounds of drugs. Pounds. We're talking about a big time dealer. Weapons. When they search his home, did they find anything? Nothing. The only evidence that we have of those two being big time drug dealers is what the accused has told the OSI, and what he has told you. There is no independent evidence of that. Don't buy his story. There is one person in here who has reason to distort the truth. It's not Special Agent Shilaikis or any of the other OSI agents, or Doctor Jain. He is sitting at that table. He has reason to distort the truth.

What else did he tell us concerning his credibility? We will discuss this further, but I want to discuss it briefly now.

Trooper Steffen, when he was on the stand, what did he testify to? That when he pulled the accused over, the accused told him he was on leave. I'm going to Indiana, turning around, and heading back to California. After Trooper Steffen informed him that, in fact, he knew his status and that he had talked to the base, the accused then says, "I guess you know I'm AWOL." Again, another reason to lie. He lies. He is a liar. He lies at every opportunity he gets and he has no credibility. Don't believe him. He knowingly used methamphetamine, and he is guilty of Charge II.

Now, let's look at Charge I, that was the second offense that we discussed. Ms. Ruth Watson came in here, and testified that on the 27th of March 1992, the accused went into the Security Pacific Bank, on Sunnymead Boulevard, and opened up an account. He deposited \$277.00 in that account. She testified that going through the bank statement, which you have in front of you, that he immediately withdrew money. Then on the 30th of March, an empty deposit envelope was placed in there stating that \$250.00 was being deposit-[345]ed. Empty envelope. Then more money is taken out. Then on the 31st of March, the accused calls the bank and talks to Ruth Watson. He said, "I lost my ATM card. I lost my temporary checks." Remember the temporary checks that she discussed, numbers 75 through 100? "I've lost my temporary checks and my ATM card." She says, "You've got to close this account. This account has to be closed." Is she doing it to be vicious with the accused? No. She

is doing it to protect him. He is saying that he lost his ATM card and his checks. She is going to protect this guy and help him out—a young airman. What happens the very next day? Look at the charge sheet. Look at Charge I. Two checks appear the 1st of April, the day after this phone call when he has lost all of his temporary checks. Look at the numbers of those. Temporary checks; two of them. Then on the 2nd of April, another temporary check. On the 3rd, another. He is a liar. He wrote a total of 17 checks. Ruth Watson testified on this stand that after the initial day on the 27th of March, he never made another deposit. Now, she testified concerning that his account was restricted, but she also testified that if he had come in to make a deposit, they would have taken it. He didn't go in and make a deposit. \$277.00 is all that was ever put into that account. He wrote 17 checks for over \$3,000.00. Look at the account. He knew at the time that he wrote those checks there was no money in that account. He had the intent to defraud. This wasn't just a failure to maintain funds after he had written a check. He knew at the time that he was committing a crime. Ms. Watson, also testified that he doesn't have an account with a different branch of Security Pacific. There are no other accounts listed with Security Pacific. One account, this one here. The account was officially closed on the 16th of April 1992.

Now, Tech Sergeant Pangilinan came in here and testified that he didn't have sure pay going into this account either. There was no money going into it, aside from \$277.00, initially, that was withdrawn.

He is guilty of Charge I. He wrote those 17 checks with the intent to commit fraud. Look at his credibil-

ity. Look at his story, at what he told Ruth Watson. She doesn't have any reason to come in here and lie about this individual. Again, one person had a reason to lie. Over there.

[346] Now, let's look at Charge III, specification 1. That is a failure to go. Mr. Gutierrez came in here, and said that on the 23rd of April 1992, the accused failed to show at 7:00 o'clock in the morning, his duty hours; that he waited. Then he called the First Sergeant, Master Sergeant Robinson. Master Sergeant Robinson went over to the accused's dorm room, opened the door and found him in there asleep. He woke him up. The accused told him, along with other things, "Ah, I'm supposed to be at work." Well, what did Master Sergeant Robinson tell you? That the previous day, 24 hours before, on the 22nd, he told the accused, "You be at work tomorrow morning at 0700 hours, over at Building 429. Report to Mr. Gutierrez." The accused knew where he was supposed to be, and he didn't do it. Mr. Gutierrez, as well, told you he had previously told the accused, "Report to me every morning at 0700, here at Building 429." He knew where he was supposed to be, and he wasn't there. We don't have to say anything more about that charge. Guilty of specification 1 of Charge III.

With regard to specification 2, the last offense that we proved. Again, let's look at the evidence. Mr. Gutierrez, on the stand, states that on the 29th of April, the accused didn't show up for work. So, we go through the same procedure. Again, with him waiting and calling Master Sergeant Robinson. This time, Master Sergeant Robinson testified that he couldn't find him either. He wasn't around. Mr. Gutierrez never heard a word from him from that time until—

well, he testified yesterday that that was the first time he has seen the accused since his disappearance. The accused never contacted him to tell him that he was in trouble or that he needed help. Master Sergeant Robinson testified he couldn't find him. Again, the accused never contacted him or told him he needed help. In fact, the next time that we hear anything of the accused is on the 13th of May, when the Iowa Highway Patrol calls and says that they have Airman Scheffer.

Trooper Steffen testified that he pulled him over, and that the accused told him, again, as I mentioned earlier, "I'm on leave from the Air Force. I'm going to Indiana, and back home to California." It was after he knew it was up, that he had been caught when he was sitting in jail, that he tells [347] him "I guess you know I'm AWOL." He lies every opportunity he gets.

There has been evidence in this case that the accused was running because he was fearful. He was fearful that people were out to get him because of his work with the OSI. Again, stop and look at that evidence; his belief that people were out to get him. Because if you believe that, in fact, he was under duress and had to run, you have to return a finding of not guilty. Let's look at that for a minute. The only person who has brought up any of those facts is the accused. He is the one that says "Billy Fink is so bad." He is the one that says "Robert Davis is so bad." You know these two horrendous drug dealers. They don't find anything at their places when they search them.

Let's go to the 24th of April 1992, the bust on Robert Davis' home. Special Agent Shilaikis, again

on the stand, told you that, in fact, on that evening he received a phone call from the accused. Was he scared? No. Was he upset? Yes. The words of Special Agent Shilaikis on the stand, he said, "Airman Scheffer was pissed off." He wanted to be in on it. He wasn't scared. No fear at all. Special Agent Shilaikis has no reason to get up here and lie to you. He was mad. He wasn't scared.

Now, we've heard testimony from the accused's parents. The father said that he did receive a phone call from his son, and that he told him that he had to get out of here. But, he doesn't remember when it happened. In fact, he told you it could have been sometime in May. It wasn't necessarily on the 30th. Now, Mrs. Scheffer has testified that it was on the 30th of April that the accused came to her. That she saw his hand, and that his hand was bleeding. Then she saw some glass in the back of the truck. She doesn't know if those windows were shot out. She doesn't know if he took his fist and popped the window. He had a bloody hand.

Again, the only evidence is coming from him and his credibility. His lack of credibility.

One other point, on the 30th he has to run. Where was he on the 29th? Mr. Gutierrez and Master Sergeant Robinson told you it was the 29th that he didn't show up for work. He was [348] officially put on AWOL status on the 30th—had to wait 24 hours. Where was he on the 29th? He lacks credibility.

There is only person in here who has a reason to lie. Again, look at the Robert Davis story. Armed to the teeth in drugs. Nothing. He did do one controlled buy from him for recreational use for \$80.00. That

was it. But, when they do the search of Robert Davis' home—nothing. Billy Fink's home—nothing. He tells Ruth Watson, "I've lost all of my temporary checks." Again, a lie, because you have in front of you that he had four of them, at least. He wrote four checks, off of those temporary checks, after he told her he had lost them all. Another lie. He told Trooper Steffen, "I'm on leave." Another lie.

This individual has no credibility. The only way you can find him not guilty of these offenses, is if you believe his story. If you are to believe that, this time he is telling the truth. Maybe he lied in the past. But, he's telling us the truth now. That's the only way.

He knowingly and wrongfully used methamphetamine. He wrote those checks. When he wrote them, he knew he had no money in his account. He was defrauding those individuals. Seventeen different checks from an account with no money in it. He failed to go. It's obvious. And, he went AWOL not under any duress, but because he didn't want to be in the Air Force any more. On that last charge, think about it. What safer place to be than March Air Force Base. If you are worried about individuals off-base, get on base and stay on base. He is lying to you. He is guilty of all charges. We ask that you return findings of guilty on each and every charge. Thank you.

MJ: Captain Williams, given trial counsel's argument, that discussion that we had yesterday regarding your argument on duress no longer applies. In other words, the limit I put on you no longer applies.

IMC: Colonel Fullenkamp and members of the court, let me try and correct a misstatement of the law that

the prosecution just gave you there. The judge told you what the law is. Prosecution says that the only way that you can find the accused not guilty is if you believe his story. That is absolutely [349] wrong. The law is that if the government has not met its burden of proving each and every element of every offense beyond a reasonable doubt, then you have to find him not guilty.

Now, earlier in the trial the judge emphasized the fact that the defense does not have to put on any evidence, because the burden of proof is on the prosecution, throughout the entire trial—to each and every element of the offense, beyond a reasonable doubt, to prove that Airman Scheffer committed these crimes. The judge, in fact, told you that we did not have to put on any evidence. We didn't have to dispute the urinalysis testing, for example. The judge has told you that, in fact, the burden at no time shifts from the prosecution to Airman Scheffer. And the judge told you that if the prosecution does not prove all of the necessary elements of the offense beyond a reasonable doubt, then Airman Scheffer must be acquitted.

So, let's look at Charge I. Focus on the very first element that the judge read to you concerning that charge. In this case, the prosecution failed to put on any evidence at all of where these checks were written. He is accused of writing them in Moreno Valley. There is no evidence here. Look at where the check is written—national chains. Look at the time that they are written. After the 28th of April, the government says they don't know where he was. The 13th of May, he ends up in Iowa. So, we know that to get from California to Iowa you are not magically

transported there in your car. You have to go through different States—Arizona, Colorado, Kansas. No evidence.

Let's look for a little bit at Charges II and III, because the facts are kind of interrelated. The OSI asked Airman Scheffer to come work for them as a source. To work for the OSI against drug dealers. When the OSI talked to him about that, Airman Scheffer went and talked to his dad.

His dad got on the stand and told you that he told his son, "This is not a good idea. You don't have any real marketable skills to offer these guys. If things turn out good for them, it will be good for you. If things go bad then they will just throw you away. They will discard you." That is what he knew from his dad up front. A little bit of a [350] prophecy there.

Now, despite his dad's advice, he went ahead and worked for the OSI. He talked to them. They told him what they wanted him to do. He was willing to do it. The OSI told Airman Scheffer what the procedures they would use would be. He was willing to follow those procedures. Now, why do they have those procedures? Agent Shilaikis said, "Because the OSI was absolutely concerned about the safety of their sources." Why? Because he said on the stand that sources had been burned in the past. They told Airman Scheffer up front that they would be asking him periodically for consensual urinalysis. He understood that. No problems. He was told by the OSI that it would help his credibility as a source if, in fact, he took these consensual urinalyses as asked. He understood that. It made a lot of sense. No problems. Airman Scheffer had every reason to remain clean and to

help the OSI, and to get the help from them that they kind of indicated that he would get in return.

Now, the first urinalysis he took in March, before they started working him against these drug dealers, turned up negative. The second urinalysis, the one in April he took after he had been working for the OSI against these drug dealers for about a month, supposedly turned up positive.

Do you remember the OSI agents telling you about the consensual urinalysis that Airman Scheffer took? Do you remember Special Agent Shilaikis on the stand, saying that as well as consensual urinalysis, there is a probable cause urinalysis, and there is a command directed urinalysis? But, the one that Airman Scheffer took was a consensual urinalysis. The OSI agents explained the consensual urinalysis form. They explained the procedures. They showed you the form that Airman Scheffer signed saying he consented. The consent form that Airman Scheffer was willing to sign. The consent form that Airman Scheffer absolutely did not have to sign. And the consent form that someone who knew drugs were in their system, and the urinalysis was going to come up positive, would not have signed it.

Now, the prosecution has a little problem with this litigation package. They went to great lengths to tell you about the consensual urinalysis; but on page 2 of the litigation [351] report it says this was a probable cause type of test. All right, that aside. Let's look at whether the prosecution has proved beyond a reasonable doubt that Airman Scheffer knowingly ingested methamphetamine or that any ingestion was wrongful.

Now, the OSI, before they could get Airman Scheffer to buy drugs from these people, had to have him re-establish relationships with them. He spent time with them, and when he spent time with them, he testified,—sometimes he spent weekends, evenings and ate meals with them. A lot of times, either one of the drug dealers, or girlfriends or whoever, sometimes Airman Scheffer would go out and get some fast food,—pizza, Mexican food, something to drink—bring it back and they would eat wherever they were at—Davis' house. At the time he was working with the OSI against these drug dealers, methamphetamine was out. Sometimes when he was eating there, he would have to get up and go to the bathroom for whatever reason; he wasn't always attending his food or the large 44 ounce soda that he got. Doctor Jain testified that methamphetamine is easily soluble—it will dissolve—in soda. Agent Shilaikis testified that he heard of people having their drinks spiked with illegal drugs. Now, the government said that they want you to think that you are gullible enough to buy his story about someone spiking their drinks. Well, you heard from the government's own witness, Special Agent Shilaikis, that he knows of people spiking other peoples drinks with illegal drugs. So, their own witness told you that. Now, the prosecution also wants you to believe that there is no one in the world, other than Airman Scheffer, who could have had access to the methamphetamine that was used to spike his food or drink. But, that's not true. They want you to think that there is no way you should believe Airman Scheffer on anything. Of course, the OSI believed him. They believed what he said was true about Billy Fink. They had him work against Billy Fink. He told them that Billy Fink was a drug

dealer. They believed him. How do we know that they believed him? They told him, "We want you to do a controlled buy. We will give you some money. We want you to go to Fink's house. We want you to buy drugs. Come back." So, they did that. They searched him first. They searched his car. Why? To make sure that he didn't have any drugs in his car, so if this went to trial, Davis wouldn't be able to say, "Hey, hey, [352] Scheffer brought the drugs to me." Absolutely out of the question. Ruled out. They gave him 100 bucks. They followed him to Davis' apartment. He went up to Davis' apartment. He bought the drugs. He came back and gave OSI a sixteenth of an ounce of methamphetamine. Now, the prosecution wants you to believe that the methamphetamine fairy came down and gave Airman Scheffer these drugs. Because it certainly couldn't have come from innocent Mr. Davis, who the prosecution would really like you to believe is not really a drug dealer, but some figment of Airman Scheffer's imagination. But, the OSI believed him, and they got their drugs from him. They knew that Davis was a drug dealer. And the prosecution would also like you to believe that Airman Scheffer wasn't being true when he told the OSI about Billy Fink, and that Billy Fink was a drug dealer. Again, drug dealing Billy Fink, according to the prosecution, must be another figment of Airman Scheffer's imagination. However, the OSI came on and testified that they positively identified this Billy Fink as being out of jail, on felony probation. For what? Child Molestation? No. For methamphetamine distribution. He was a meth dealer. Prosecution tried to say that the only evidence that Billy Fink was a meth dealer came from Airman Scheffer's own mouth. That's not true. The OSI said, "Yup, we knew it."

The West End County Task Force knew it. Billy Fink, convicted methamphetamine dealer, out on felony probation.

Prosecution also wants you to believe that these drug dealers are potentially armed and dangerous, is another figment of Airman Scheffer's imagination. Well, the West End County Task Force knew better. They work with drug dealers everyday. They work on busting drug dealers. They knew that these guys are dangerous characters. They knew that they are frequently armed and dangerous. How do we know they knew that? Well, when the West End County Task Force, along with the OSI, went and busted Davis' and Fink's house, did they just walk in there and say "Hi, here we are, we'd like to search your house?" No. They all had bulletproof vests on. There were between five and ten of them. They are only expecting one guy in there. Between five and ten officers of the West End County Task Force, with bulletproof vests, armed to the hilt, guns out of their holsters, ready to go in. Why? It certainly wasn't because they thought this was a figment of someone's imagination. They knew that [353] drug dealers are frequently armed and dangerous characters. The OSI also knew that drug dealers are frequently armed and dangerous characters. Anybody who watches TV, evening news, here in Southern California, knows that drug dealers are frequently armed and dangerous characters. It appears that the prosecution are the only people in the courtroom that don't know that drug dealers are frequently armed and dangerous characters. We also know from watching the news, virtually every night, that drug dealers and gang members are shooting each other. Shooting each

other. Sometimes they hit the people they intend. Sometimes they shoot innocent people.

Now, Agent Shilaikis testified that he didn't tell Airman Scheffer about the raid. And that later that night, about 11:00 o'clock at night, he got a call from Airman Scheffer who was upset. He was upset because he didn't know what had happened. He ran into Robert Davis. What did Davis say? He said, "Scheffer, you so and so, the cops raided my house, and I think that you finked on me." Davis thought that Airman Scheffer—had snitched on him to the police. He had. He was right. Armed and dangerous drug dealers, who suspect that someone has ratted them out to the cops, are exactly the kind of people who have the will, and are exactly the kind of people that want to get revenge and can get revenge. They are willing to use their weapons on people who snitch on them. That's what happened.

Now, the OSI, supposedly being professional law enforcement officers, after realizing that Airman Scheffer's life was in danger, that the folks—the drug dealers—that he was working against, thought he was the one who had snitched out on them, should have said, "Listen, it's time to stop. Stop this operation. Don't talk to Davis anymore. Don't contact him. Stay here on the base. Stay away from these guys. They are dangerous." Did they do that? No. Agent Shilaikis said, "We will try and have him work against them later." What happened? A week after the raid, Airman Scheffer showed up at his mom's house. He was scared. He was agitated. He was upset. Mrs. Scheffer, who has absolutely no reason to lie, came in and said, "My son's hand was cut and bleeding." She noticed it. She said, "What's wrong?"

He said that he had gotten cut on his hands taking broken windows out of his truck, because they had just been [354] blown out. Somebody had just tried to kill him. She looked in the back of his pick-up bed, and there was the cracked window. This was no figment of Mrs. Scheffer's imagination. Airman Scheffer, at that time, told his mom, "I got to get out of town. People are shooting at me. I'm not going to stick around here." Later that evening,—and the prosecution wants to quibble with Mr. Scheffer's memory of the day, but I asked and he clarified that he, in fact, talked to his son later in the evening that his windows got shot out. So, he talked to him on that same day. He was upset. He was almost hysterical. His dad said, "Normally, I can calm him down, but I couldn't calm him down that night." He told his dad, "I got to get out of town. Somebody is trying to kill me." That was Airman Scheffer's mind when he left the local area to find a safe place to stay. He feared for his life. He fled for safety.

Now, the government wants to make it a big case out of the fact that when he was stopped, Airman Scheffer didn't tell Trooper Steffen the truth. Well, he was faced with a little bit of a quandary there. Do I tell this police officer the truth, that I'm not on leave, and have him take me back to Southern California, where people are trying to kill me; or do I tell a little fib and hope that he will let me go on my way to safety? His was an easy and logical choice to make. He made it.

Members of the court, in conclusion we would argue that, in fact, the government has not met its burden. They have not proved to you beyond a reasonable doubt all the evidence necessary to support each and

every element of Charge I, Charge II or the AWOL. As a result, a finding of not guilty should be returned for these charges.

Now, the prosecution gets another chance to come and talk to you. This is our last chance. I would ask you to consider, when you listen to the prosecution's argument, what we would say in response to that argument, in your deliberations. Thank you for your time.

MJ: Captain Russell.

ATC I: Thank you, Your Honor.

[355] First of all, I want to clear up the misconception of what I said; that the only way you can find him not guilty is by believing his story. I in no way meant to place the burden of proof on the defense. To the defense and to Airman Scheffer, I apologize for that.

But, the facts are proven beyond a reasonable doubt. Let's go back through these offenses one last time.

The meth use. We didn't say that a drink couldn't be spiked, or that the food can't be spiked. We didn't say that. Yes, it's possible, but is it probable? Are you going to throw money away? Pull that billfold out, throw that money in there for no apparent reason. But, more than that, is that the accused told you he knows what the effects of methamphetamine are. He told you on the stand that he never felt it. That's the improbable. That's the impossible and implausible part of this; is that he never felt it. He knows what methamphetamine feels like. He is telling you he never felt it. Again, the defense brought it up that he consented to this urinalysis. He sure did. He con-

sented. And, on the 6th of April, that evening, and on the morning of the 7th, he worked like a dog to come up with a story to cover his tail. That's what he did. What did he tell you? Just remember that. Just keep remembering that story; that hokey story that he related to you. It doesn't even make sense. You can't become unconscious with meth use, and that's what he is telling you happened. Don't believe it. He felt the effects, because he knowingly used it.

Again, the checks. You can infer from looking at the checks, up to the 30th of April, that he was in Moreno Valley. As far as the other checks, we don't know. That's for you to decide—those other three checks. We have no evidence from the 30th of April until the 13th of May that he wasn't in Moreno Valley. All we know is that on the 30th of April he was here, and on the 13th of May he was found in Iowa. You can infer that. Again, look at the dates of those checks. He wrote them all after he said he lost his temporary checks. He wrote them after there was no money in his account. When he started on the 1st of April, he knew there was no money in that account. He had the intent to defraud all of those different individuals and companies. He is guilty of the first charge.

[356] Failure to go, there is no question on that.

Let's go back to the AWOL for a moment. It still goes back to credibility.

We're not trying to tell you that Robert Davis and Billy Fink don't use drugs. And the defense got up here and said the West End County Task Force went in armed through the teeth, bulletproof jackets, weapons drawn. Why did they do that? Because of what the

accused had told the OSI. He is the one that said they were armed to the teeth, had pounds of drugs. The OSI is not supposed to believe him at that point? The West End County Task Force is not going to believe the OSI? The only reason they went in that way is because of what the accused had told them, based on his information. Again, what did they find? Nothing. Yes, he did one buy. A recreational use from Robert Davis. Are we saying those two are clean? No. Are they armed and dangerous? We have no evidence of that whatsoever.

On the 24th of April 1992, after this bust, if the accused was so scared and so frightened, thought his life was in peril, why didn't he tell the OSI, "I'm out of here?" He wasn't working full time for the OSI; he was in transportation. But, why didn't he tell Special Agent Shilaikis or anyone else over there, "That's it, I'm through, they're going to get me.?" It never happened. He is a big boy. He could have walked away from this. Trying to say that the OSI was out to burn this individual is wrong. There is no evidence of that whatsoever. They weren't leaving him out there hanging in the wind. He never said anything to the OSI about being scared, or that his life was in danger. That's coming from the accused.

As for the testimony of the parents, every parent wants to believe that their child is a good child—each parent. Consider the fact that they are his parents. But, again, consider that neither one of them saw anyone shoot out the windows. The father didn't even see the truck. He talked to his son on the phone. The mother saw the truck. She saw a bloody hand, as well. She didn't see any bullets fired. All she saw was a

bloody hand and some broken glass. Nothing to say, that it happened the way he said it happened.

[357] Again, the burden of proof is on the government. The government has proven each and every one of these offenses beyond a reasonable doubt. The only verdict that you can come back with is a finding of guilty on each charge and each specification. Thank you.

* * * * *